IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 11713 of 2000

HON'BLE MR.JUSTICE K.S.JHAVERI

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

VR SHARMA

Versus

STATE OF GUJARAT

Appearance:

MR IS SUPEHIA for Petitioner

MR PD BHATE, AGP, for Respondent

CORAM : HON'BLE MR.JUSTICE K.S.JHAVERI

Date of decision: 24/08/2004

ORAL JUDGEMENT

1.0 By way of this petition the petitioner has prayed for a direction to quash and set aside the order dated 10.10.2000 of compulsory retirement of the petitioner and to reinstate him in service with all the benefits with 12% interest.

2.0 The petitioner was appointed as Police Sub Inspector in the year 1965. He came to be promoted to the post of Police Inspector in the year 1974 and lastly he was promoted to the post of Deputy Superintendent of Police in the year 1988.

2.1 A charge sheet dated 26.10.1994 was issued to the petitioner for holding a departmental inquiry against him in respect of three charges which are as under:

[a] He was asked to remain present on 31.12.1993 at 18 hours by the wireless message of the D.S.P. for the purpose of note-reading in the annual inspection of Mehsana City Police Station and Mehsana Taluka Police Station, but he did not remain present.

[b] On 31.12.1993 at 19.25 hours his location was not Kheralu, but still he said on the wireless message that it was Kheralu. It appeared from his voice on the wireless set that he was an intoxicant condition; and

[c] On 31.12.1993 at 21 hours he was found in an intoxicant condition in Mehsana city near Shilpa garage compound on Highway read at Vyavar Auto garage and one full bottle and two empty bottles of foreign liquor and other articles were found from his possession.

2.2 An Inquiry Officer was appointed to hold the departmental inquiry, who, after holding the inquiry, submitted his report on 12.1.1999. According to the report, all the charges levelled against the petitioner were proved. The respondent called upon the petitioner to make his representation against the Inquiry Report. The petitioner made his representation on 21.8.1999. After considering his representation the respondent by order dated 10.10.2000 imposed penalty of compulsory retirement. It is against the said order the present petition has been filed.

2.3 It is pertinent to note that in respect of the third charge viz. regarding the petitioner having been found in an intoxicant condition, a criminal case is pending in the Court at Mehsana. In this connection a chargesheet dated 9.7.1994 was filed against the petitioner and another for offences punishable under sections 129, 120, 202, 217, 221 and 510 of IPC and sections 61-B, 65-E, 81, 116-B, 85(1)(3) of the Bombay Prohibition Act. The substance of the chargesheet is

that on 31.12.1993 at 21 hours the petitioner was found in a drunken condition in Mehsana Highway Road near Shilpa garage compound and one full and two empty bottles of foreign liquor were found from his possession.

3.1 Learned counsel for the petitioner submitted that the preliminary inquiry was not conducted by a superior officer and on this ground alone the impugned order requires to be quashed. In this behalf he has relied upon the instructions issued by the STate Government on 18.10.1967 wherein it is held that as far as possible the inquiry should be entrusted to an officer above the rank of the delinquent.

3.1.1 He has also relied upon Rule 371(1) which deals with Enquiry against senior officers. As per subrule (1) wherever a serious charge reflecting on the integrity or honour of an officer of Indian Police/Indian Police Service or of similar status is made publicly or by a responsible person and is supported by allegations of fact, those facts should be enquired into and put on record at the earlist opportunity through the agency of an officer of position and trustworthiness on whose findings Government can rely. Such an enquiry should normally be made preferrably by the Inspector-General of Police if the officer concerned is of the rank of Deputy Inspector-General of Police; by a Deputy Inspector General of Police if the officer concerned is of the rank of a Superintendent of Police and by a Superintendent of Police if the officer concerned is of the rank of an Assistant Superintendent of Police or a Deputy Superintendent of Police. He has also placed reliance upon the decision reported in AIR 1954 Bombay 361.

3.2.1 Learned Advocate for the petitioner submitted that the departmental proceedings and the consequent impugned order of penalty are liable to be quashed and set aside on the ground that three of the departmental witnesses were not permitted to be cross-examined by the petitioner. According to him the petitioner had requested the Inquiry Officer to postpone the cross-examination of the witnesses till the criminal trial was over since it would cause prejudice to him However, two witnesses viz. Shri Kishorsinh M. Waghela and Shri B.M. Rajpara were examined on that day and thereafter the matter was adjourned. The contention is that the petitioner was not allowed to cross-examine the witnesses.

3.2.2 Learned counsel for the petitioner submitted that certain copies which were supplied to the petitioner were

illegible and though request was made to supply the same, such request was denied. According to the learned counsel, this has caused great prejudice to the petitioner in his defence.

3.2.3 Learned counsel for the petitioner submitted that no intimation for hearing was given and therefore the petitioner could not attend the hearing.

3.2.4 Learned counsel for the petitioner further submtited that as per Circular dated 22.10.1984 when a criminal proceeding is pending, the departmental proceeding should be stayed. But in the present case though the criminal case was pending, the respondents proceeded with the departmental proceedings.

3.2.5 Learned Advocate submitted that five witnesses were examined in the absence of the petitioner on 25.9.1998 and at the end of their evidence it was stated that the petitioner had not remained present on that day. According to the petitioner, he had received the intimation dated 18.9.1998 about the hearing which was kept on 25.9.1998. On receipt of the intimation the petitioner requested the District Superintendent of Police, Kutch, under whom the petitioner was working at that time, to permit him to go to Gandhinagar to attend the inquiry. However his request was rejected by the DSP by wireless message sent to the petitioner on 22.9.1998 to the effect that the petitioner was not permitted to go to Gandhinagar on account of law and order situation and he was required for bandobast. The petitioner was advised to request for another date of the inquiry. He submitted that it is under these circumstances the petitioner could not attend the Inquiry on that day. The petitioner had therefore requested for another hearing which was not granted to him.

3.3 Learned counsel submitted that in respect of the third main charge, the criminal trial was still going on which was also refused and informed the petitioner that departmental inquiry can be proceeded along with the trial. He submitted that the impugned order has been passed pending the criminal trial and therefore the same is illegal and bad in law. Learned Advocate also relied upon a Circular dated 22.10.1984 wherein in para 26 it is stated that if it is intended to prosecute, a finding and sentence should not be recorded in the departmental proceedings till after the disposal of the criminal case. He has also pointed out Note to Rule 156 of the Bombay Civil Services Rules 1959, which states that the departmental proceedings should not be completed against

a Government servant until the appeal against the conviction, if any, is decided by the Appellate Court.

3.4 Learned Advocate further submitted that the impugned order is liable to be quashed and set aside since it suffers from non-application of mind to the representation 21.8.1999 submitted by the in response to the show-cause notice. The further contention of the petitioner is that the whole departmental proceedings were initiated with a malafide intention inasmuch as the petitioner had challenged his transfer and that transfer order was quashed and set aside by this Court by judgement and order dated 29.6.1992 passed in LPA No.4/92.

4.0 Mr. P.D. Bhate, learned AGP for the respondent submitted that against the impugned order there is an alternative remedy by way of filing an appeal under Rule 18(1)(2) of the Gujarat Civil Services (Discipline and Appeal) Rules, 1971 and therefore this petition may not be entertained.

4.1 He submitted that the disciplinary actions proceeded against the petitioner was for serious misconduct and it is not necessary to wait till the outcome of criminal case and department is at liberty to proceed with the disciplinary actions against the employee. according to him, it is after holding the departmental inquiry the impugned order was passed.

4.2 Mr. Bhate submitted that the petitioner had remained absent from duty and disregarded the orders of his superiors. He submitted that the petitioner is a Class I Officer of the rank of Deputy Superintendent of Police and he should not have violated the prohibition laws. According to him, instead of protecting the law, the petitioner was violating the law and was consuming liquor. Apart from that he misguided the superior officer by making false statement in intoxicated condition on the date of the incident.

5.1.1 Learned counsel for petitioner relied upon a decision of this Court in the case (M/s) Kotecha Ceramics Vs. Union of India & Anr., reported in 1991(1) GLH (U.J.)1 wherein it is held as under:

> "... Therefore, if the disciplinary proceedings are commenced and continued against the appellants, there will be serious prejudice to the appellants inasmuch as they may have to disclose their defence, which they propose to

take up in the criminal trial. The foundation for the criminal charges and the misconduct for which disciplinary proceedings are initiated being the same, it would not be advisable, to continue disciplinary proceedings till the criminal trial pending against the appellants ends. Therefore, the appellants are right in contending that there will be serious prejudice to their defence in criminal trial, if the disciplinary proceedings are allowed to continue against them. Therefore, the proper course to adopt is to restrain the respondents from proceeding further with the disciplinary proceedings initiated against the appellants by show cause notices as aforesaid." (emphasis supplied)

5.1.2 In this context it is required to be noted that stay of departmental proceedings pending criminal trial should not be done as a matter of course. If the ambit and scope of both the proceedings, nature of allegations, etc. are different, no stay of department proceedings should be granted merely because criminal prosecution is pending. In the present case the criminal prosecution is with regard to the allegation regarding consumption of alcohol, whereas the departmental proceedings were in with respect to serious misconduct coupled with consumption of alcohol. Therefore, in my opinion, the respondent authorities were right in proceeding with the matter.

5.2.1 Learned counsel for the petitioner relied upon a decision of this Court in the case of Letters Patent Appeal No.215 of 1977 dated 2.4.1980. In the said decision this Court held as under:

"... There was no evidence that any person had witnessed the petitioner taking prohibited liquor. Thus, there was no direct evidence on record. The only evidence on which the department relied upon was the evidence of the medical officer. The medical Officer stated that the police constable was smelling of alcohol from his month and he was not under the influence of alcohol. he was conscious his eyes were normal. His gait was steady. He was able to take care of himself. He was, therefore, a normal person barring that his mouth smelt of alcohol. Medical Officer is not expected to be an expert on smells and from mere smell coming from the mouth of a person one can never conclude that the person had

consumed prohibited liquor."

5.2.2 In the present case it is required to be noted that the it was proved beyond doubt that the petitioner was in an intoxicated condition with bottles of Alcohol near Shilpa Auto garage. The petitioner is a Class-I officer of the rank of Deputy Superintendent of Police and he should not have behaved like this. The man who should protect the law is violating the same, it is a serious offence. Therefore the aforesaid decision is of no assistance to the petitioner.

5.3.1 Learned counsel for the petitioner relied upon a decision of the he Supreme Court in the case of Kshinath Dikshita Vs. Union of India, reported in AIR 1986 SC 2118 wherein it is held that non supply of copies of statements of witnesses and copies of documents relied upon by the disciplinary authority would cause prejudice to the employee. In that case the Court held that in the facts and circumstances of the case it is impossible to hold that the appellant therein was afforded reasonable opportunity to meet the charges levelled against him.

5.3.2 In the present case opportunities were given, but the petitioenr has tried to delay the proceedings. He has not availed of the opportuhity though given and now it is not open for the petitioner to raise such contention.

5.4.1 Learned counsel for the petitioner has also relied upon a decision of this Court in the case of Surat Municipal Corporation Vs. Chotubhai D. Vashi, reported in [2003) GHJ (118) wherein it is held that non-supply of documents along with chargesheet and to direct inspection or offer liberty to copy out certain document, if required, is also contrary to the principles of natural justice.

5.4.2 In the present case the petitioner was given opportunity to inspect the documents. On the facts of the case it cannot be said that non-supply of documents has resulted in prejudice to the petitioner. The petitioner has failed to point out that supply of the illegible documents has seriously affected his case and if the legible copies were granted the outcome of the inquiry would have been different. Taking overall view of the matter I have no doubt in my mind that the petitioner has been given reasonable opportunity to defend himself.

5.5.1 Learned counsel for the petitioner relied upon a

decision of this Court in the case of Mohanbhai Vs. Y.B. Zala, reported in 20(2) GLR 497, wherein, in para 3 it is held as under:

> "3. ... A mere lapse in regard to such a small matter by itself regardless of the underlying cause for the lapse cannot constitute negligence or dereliction from duty. A police constable must be given an opportunity to effectively explain the circumstances in which the lapse occurred in order to satisfy the disciplianry authority that the lapse was neither intentional nor deliberate nor on account of indifference or negligence but was occasioned by circusmtances beyond his control. If he can satisfy the disciplinary authority on this point the charge cannot be established. Can he, however, at all offer a satisfactory explanation on the basis of his memory when the charge is levelled one and half years after the occurrence? Having regard to the very nature and content of the charge, a delay of about 1 and half years must be considered fatal from the point of view of affording reasonable opportunity to the constable concerned to show cause against the charge levelled against him. It would be asking for the impossible to expect the constable concerned to explain satisfactorily the reason which occasioned delay in reporting for duty."

5.5.2 From the record of the case reasonable opportunity has been afforded to the petitioner. The petitioner has defended his case and he had also offered his explanation. However, the authority found that the charges levelled against him were proved and in my opinion in the police force the authorities are justified in expecting strict discipline from the officers.

6.1.1 Learned counsel for the respondents relied upon a decision of this Court in the case of Regional provident Fund Commissioner Vs. B.M. Mehta, reported in 1999(2) GLH 192. Para 11 of the said decision reads as under:

> "11. Recently, in Kirankumar R. Baxi Vs.United Commercial Bank, (1998) 1 GLR, 256, following the above decisions and upholding the action of the Bank in proceeding further with the departmental inquiry, speaking for the Division Bench, one of us (C.K. Thakkar, J.) stated:

> "From the above cases, it is clear that not only

both the proceedings can simultaneously be taken but in the opinion of the Apex Court, ordinarily departmental proceedings must be concluded as expeditiously as possible and they should not be stayed on the ground of pendency of criminal trial. Considering the ambit and scope, nature of allegations: mode of enquiry,object underlying such proceedings, standard of proof, burden of proof, order to be passed, etc., departmental proceedings should not be stayed merely on he ground of pendency of criminal prosecution."(emphasis supplied).

6.1.2 The above decision clearly answers to the contention of the petitioner that the departmental proceedings should not be stayed when the criminal proceedings are pending.

6.2.1 Learned counsel for the respondents relied upon a decision of the Supreme Court in the case of State of Tamil Nadu Vs. P. Bose, reported in AIR 1993 SC 1981. In para 1 of the said decision the Supreme Court held as under:

"Failure to attend to duty to restore law and order, failure to promptly register a serious offence and refusal to carry out or obey instructions of a superior, though visited with minor penalties are not matters which are not germane to the selection process. The next higher post of Inspector of Police being a very responsible post, a person with a weak record with three punishments in the immediately preceding year, if not selected, could not be heard to say that though fit for promotion to the next higher post he was wrongly ignored. the post of Inspector of Police being a pivotal post in a uniformed service must be filled in by persons of integrity and devotion to duty and internal discipline and anyone who has betrayed a tendency to ignore the same in the immediate past cannot aspire for promotion.

6.2.2 The above decision clearly states that refusal to obey order of superiors is serious misconduct and can be taken into consideration even while considering for promotion. In the present case, as stated above, the petitioner has disobeyed the orders of his superiors, which allegation was proved. Therefore, no infirmity can be found in the decision of the respondents especially when the petitioner is a Class I Officer of the rank of

Deputy Superintendent of Police.

6.3.1 Learned counsel for the respondent relied upon a decision of the Supreme Court in the case of M. Paul Anthony Vs. Bharat Gold Mines Ltd., reported in (1999)3 SCC 679. Para 22 of the said decision reads as under:

"22. The conclusions which are deducible from various decisions of this Court referred to above are:

(i) Departmental proceedings and proceedings in a criminal case can proceed simultaneusly as there is no bar in their beign conducted simultaneously, though separately.

(ii) If the departmental proceedings and the criminal case are based on identical and similar set of facts and the charge in the criminal case agaisnt the delinquent employee is of a grave nature which involves complicated questions of law and fact, it would be desirable to stay the departmental proceedings till the conclusion of the criminal case.

(iii) Whether thenature of a charge in a criminal case is grave and whether complicated questions of fact and law are involved int hat case, will depend upon thenature of offence, thenature of the case launched against the employee on the basis of evidence andmaterial collected against him during investigation or as reflected in the charge-sheet.

(iv) The factors mentioned at (ii) and (iii) above cannot be considered in isolation to stay the departmental proceedings, but due regard has to be given to the fact that the departmental proceedings cannot be unduly delayed.

(v) If the criminal case does not proceed or its disposal is being unduly delayed, the departmental proceedings, even if hey were stayed on account of the pendency of the criminal case, can be resumed and proceeded with so as to conclude them at an early date, so that if the employee is

found not guilty his honour may be vindicated and in case he is found guilty, the administration may get rid of him at the earliest."

23. In the instant case, the Superintendent of Police had raided the residential premises of the appellant and had recovered a mining sponge gold ball weighing 4.5 grams and 1276 grams of "gold-bearing sand". It was on this basis that a criminal case was launched against him. On the same set of facts, cosntituting the raid and recover, departmental proceedings were initiated against the appellant as the "recovery" was treated to be a "misconduct". On the service of the charge-sheet, the appellant raised an objection that the departmental proceedings may be stayed as the basis of these proceedings was the raid conducted at his residence on which basis a criminal case had already been launched against him. He requested that the decision of the criminal case may be awaited, but his request was turned down. The request made a second time for that purpose also met the same fate. When the appellant approached the High Court, liberty was given to the respodnents to stay the departmental proceedings if they considered it approopriate but theyw ere directed to dispsoe of the appellant's appeal against the order by which he was placed under suspension. The order of the High Court had no effect on the respondents and they decided to continue with the departmental proceedings which could not be attended byt he appellant as he informed the enquiry officer that he was ill. His request for adjournment of the departmental proceedings on that ground was not acceded to and the proceedings continued ex parte against him. He was ultimately found guilty of the charges and was dismissed from service."

6.3.2 In the said case the Supreme Court considered the simultaneous continuance of Departmental Enquiry and criminal proceedings and held that the scope of the two proceedings is different and they can be continued independently. Therefore, the decision to continue with the departmental inquiry cannot be faulted.

7.1 There is no dispute about the facts of the case. The petitioner was placed under suspension by an order dated 6.1.1994 and then he was reinstated on 18.9.1996. A preliminary inquiry was conducted against the

petitioner and sufficient evidence was found and therefore charge sheet was issued to the petitioner.The petitioner did not submit his defence statement and therefore the authority has issued a memorandum dated 22.12.1994 urging him to submit his defence statement.Even then he did not submit his defence statement, but sought for certain additional documents. Though this request was rejected, the petitioner was called upon by letter dated 3.2.95 to inspect the illegible documents and to submit the defence statement. However, this was not done by the petitioner. Again a reminder was given to the petitioner on 21.6.95 to which also there was no response from the petitioner. Therefore the authority has decided his case exparte and the inquiry officer was appointed on 26.9.1995. Thus, the petitioner should not be allowed to take advantage of his own lapses if he has not availed of the opportunities afforded to him.

7.2 It is on record that about 10 hearings took place, out of which only on two occasions the petitioner remained present before the Inquiry Officer. The petitioner has clearly exhibited non-cooperative attitude during the course of departmental inquiry. The report of the Inquiry Officer shows that all the charges levelled against the petitioner were held proved. Therefore, a second show-cause notice was issued to the petitioner along with the inquiry report. Again, instead of submitting his defence the petitioner sent a representation on 28.12.1998. Again the petitioner was requested to submit his defence statement vide letter dated 21.5.1999. Thereafter time was granted to the petitioner and ultimately the petitioner submitted his defence statement. According to the respondents, the charges which were proved after inquiry were so grave that they deserved severe penalty of imposition of dismissal or removal from the service.

7.3 From the facts of the case I do not find any substance in the contention raised by the petitioner that there is violation of principles of natural justice. The record clearly shows that sufficient opportunity was given to the petitioner. Even for submitting the defence statement the authorities had to issue memorandum to the petitioners for more than two times.

8.1 According to the petitioner, the preliminary inquiry against the petitioner was conducted by an officer of equal rank which is against the principles of natural justice. However, as per the record the preliminary inquiry was conducted by an officer senior to

the petitioner and therefore no grievance can be raised in this behalf. In any case, there is nothing on record to show that the petitioner has objected to the appointment of said Inquiry Officer and at this stage the petitioner cannot be permitted to advance such argument. Even otherwise, the preliminary report was not relied upon by the authority. The ratio laid down in the judgement of the Bombay High Court reported in AIR 1954 Bombay 361 is not applicable to the facts of the present case in view of the fact that no penalty is imposed on the basis of preliminary report.

8.2 It is true that the Inquiry Officer had adjourned the hearing for next date to cross-examine the witness, but on the next date of hearing it was clear that the request of the petitioner to stay the inquiry proceeding till criminal trial was over was not accepted by the authority. In view of the law laid down by the Apex Court the Authority was justified in rejecting the said request.

8.3 I also find no merits in the contention that legible copies were not supplied to the petitioner. However, by memorandum dated 3.2.1995 the petitioner was called upon to inspect the illegible documents. However, the petitioner did not go to inspect the documents which clearly establish the non-cooperative attitude.

8.4 As regards the contention that no intimation for hearing was given, it is not established that the petitioner was not informed about the date of hearing. There is no evidence on record even in the form of application to prove that such grievance was made before the Inquiry Officer or Disciplinary Authority.

8.5 The contention that as per Circular dated 22.10.1984 when a criminal proceeding is pending, the departmental proceeding should be stayed has no substance at all. In view of the law laid down by the Supreme Court it was open for the Department to proceed with the Departmental Inquiry.

8.6 As regards the contention that the petitioner was not permitted to go to attend the inquiry is concerned, it was only on one occasion and according to the respondents out of ten, the petitioner had not attended on eight occasions. Therefore, merely at one time the petitioner was not permitted to go would not give a cause for setting aside the inquiry proceedings. Apart from that he had not informed the same to the Inquiry Officer. It is contended that DSP, Kutch had informed DSP

Gandhinagar and therefore hearing should have been adjourned.

8.7 I also find no substance in the contention that departmental proceedings should not be completed against a Government servant until the appeal against the conviction, if any, is decided by the Appelalte Court. In a given case the Department may proceed with the Departmental Inquiry. The object of staying the Departmental Inquiry is to see that delinquent is not required to open his defence so as to prejudice his case in the criminal proceedings. In the present case the petitioner has not opened his defence and therefore no prejudice is caused to him. In any case such contention was not raised before the authorities regarding the so-called prejudice against the petitioner.

8.8 Allegation of malafide is raised by the petitioner on the ground that the petitioner had challenged his transfer which was quashed this Court. However, no allegation is made against any particular officer who has possibly kept a grudge against the petitioner. The cancellation of transfer order of the petitioner would be of no benefit to any of the authorities and on this ground no malafide can be alleged and therefore this contention cannot be accepted.

9.1 It is also required to be noted that against the order in question there is an alternative remedy by way of filing an appeal under Rule 18(1)(2) of the Gujarat Civil Services (Discipline and Appeal) Rules, 1971, which the petitioner has not exhausted before approaching this Court invoking jurisdiction under Article 226 of the Constitution of India.

9.2 According to the respondents, considering the length of service and after giving sympathetic consideration the punishment of compulsory retirement was imposed. The petitioner has also shown disregard to the orders of his superior which is also a serious misconduct in the police force and therefore I fully agree with the conclusion of the respondent authorities.

9.3 In the result, I do not find any merits in the petition. Accordingly the petition is rejected. Rule is discharged with no order as to costs.

[K.S. JHAVERI, J.]
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